Strategy Research Project

OFFENSIVE LAWFARE

BY

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Lawfare is defined in various ways, but it is essentially a way to describe legal activities within the context of armed conflict. The Army's operational concept provides a framework within which to conceptualize "offensive lawfare" which, in the current global counter-insurgency conflict, should be understood to include efforts to deny enemy forces sanctuary, to blunt their abuse of courts, and to use both foreign and domestic courts to better support our national security strategy. Policy discussions to improve our offensive lawfare posture should include providing support to litigants in certain domestic and foreign court actions that are deemed to be congruous with these ends. More specifically, policy discussions should consider providing support to plaintiffs in terrorism related domestic civil litigation, to certain defendants in certain foreign criminal actions, to defendants in foreign civil litigation that is deemed to be related to the current conflict and to plaintiffs pursuing foreign causes of action against terrorist organizations and their supporters.

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USAWC STRATEGY RESEARCH PROJECT

OFFENSIVE LAWFARE

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Lawfare is defined in various ways, but it is essentially a way to describe legal activities within the context of armed conflict. The Army‟s operational concept provides a framework within which to conceptualize “offensive lawfare” which, in the current global counter-insurgency conflict, should be understood to include efforts to deny enemy forces sanctuary, to blunt their abuse of courts, and to use both foreign and domestic courts to better support our national security strategy. Policy discussions to improve our offensive lawfare posture should include providing support to litigants in certain domestic and foreign court actions that are deemed to be congruous with these ends. More specifically, policy discussions should consider providing support to plaintiffs in terrorism related domestic civil litigation, to certain defendants in certain foreign criminal actions, to defendants in foreign civil litigation that is deemed to be related to the current conflict and to plaintiffs pursuing foreign causes of action against terrorist organizations and their supporters.

OFFENSIVE LAWFARE

During the past decade the United States and its citizens have been subjected to numerous legal actions in European and domestic courts that appear to be aimed at negatively impacting the United States‟ ability to fight Islamic extremists. These cases range broadly and include actions to enjoin the United States from targeting certain individuals,[1] actions to silence critics of radical Islam,[2] incessant abuse claims by detainees,[3] and actions seeking damages for alleged wrongs associated with the investigation, prosecution and detention of Islamic terrorists and their supporters.[4] This type of activity has been described as “lawfare” by numerous legal scholars and other commentators. The resultant court actions tend to place the United States in a defensive posture and have several potentially negative results.

The lawfare concept just described raises the question of whether the United States can or should adopt a policy to change its defensive posture within these venues. Consequently, this paper will examine options for the United States to incorporate offensive lawfare operations into its current conflict strategy. The lawfare concept discussed in this paper offers a construct within which to explore policies to disaggregate legal actions that are apparently aimed at negatively impacting the United States‟ ability to conduct offensive operations against Al-Qa‟ida and its affiliates, but also to explore policies to actively pursue or support actions in foreign and domestic courts aimed at degrading Islamic extremist capabilities and activities. Minimizing the abuse of legal forums by foreign and domestic adversary groups should not be forgotten, but the fundamental policy conversation should focus on acknowledging the

expansion of the battlefield into this arena as a reality of 21st-century warfare and incorporate this battlespace into the national security strategy.

Scope of the Term “Lawfare”

The term “lawfare” has not yet gained a generally agreed upon definition, perhaps because it is such an evocative portmanteau word. At present, there appear to be three basic lines of reasoning that support different approaches to defining and using the term lawfare. These three basic approaches are best categorized as the neutral approach, the negative approach, and the nexus approach. Each of these approaches adds texture to the conversation of how “lawfare” should be understood and help frame the problem.

In its most basic and “neutral” approach, the term lawfare “describes a method of warfare where law is used as a means of realizing a military objective.”[5] This broad definition, proffered by Air Force Judge Advocate, Colonel Charles Dunlap, in a 2001 article on humanitarian interventions has been widely cited. The article itself is generally recognized as having started the lawfare conversation over the past decade. In 2008, then Major General Dunlap offered a more refined but still neutral definition by describing lawfare as “the strategy of using - or misusing - law as a substitute for traditional military means to achieve an operational objective.”[6]

The”negative” approach, as the title suggests, ascribes a particularly negative connotation to the term lawfare and is usually used when referring to the abuse of legal ideals and systems by non-State actors aimed at influencing State behavior.[7] The “negative” approach is also contained within MG Dunlap‟s earlier article where he uses the neutral definition as context for a more narrow, and arguably more emotionally charged discussion of opposition efforts to undermine public support, by making “…it

appear that the U.S. is waging war in violation of the letter or spirit of [the law of armed conflict]."[8] A further refinement of this negative connotation uses the term only to describe abuses when the objective appears to be to undermine the foundations of the legal system in which the action is taken; such as using liable laws to hinder free speech.[9] Certainly this type of illegitimate activity within a legal system merits the specific attention for counter-measure development, which this refinement seeks to generate. The fact that making spurious abuse complaints in courts is advocated in Al-Qaeda training manuals[10] and the frequency of such complaints by Al-Qaeda members and other supporters of extremist Islamic ideology lends credence to the notion of lawfare as an abusive practice.

The "nexus" approach can be best understood as framing "lawfare" as activities with a legal nexus, undertaken during times of armed conflict. The nexus approach includes a wide variety of discussions simply because of the diversity of wartime activities that have some direct or indirect legal component.[11] Some have described the use of military commissions in occupied territories as a form of lawfare,[12] ascribing neither negative nor positive connotations to the activity. Others have used the term to negatively label any action they deem to be unfair, if attributed to governmental officials associated with alleged terrorist cases.[13] Brigadier General Mark Martins, Commander of the Rule of Law Field Force – Afghanistan, views using the rule of law to set conditions for successful counter-insurgency (COIN) operations as "affirmative lawfare" and explains: "By building legal institutions that have credibility and authority, wielders of COIN lawfare serve the ends at once of helping protect the population and of holding all of the other COIN instruments… to purposes and methods that comply with law and

advance the project of unhinging the enemy on a political level."[14] While not unreasonable, these "nexus" uses arguably conflate the use of legal processes during a time of war, regardless of its purpose or effect, with the use of legal processes as a means of warfare.[15]

Although the debate over a specific definition of lawfare may continue for some time, the three approaches collectively suggest that a holistic embrace of the topic might prove useful to United States' policy makers in the current conflict. The negative branch, by framing lawfare as an abuse of legal ideals and processes suggests that lawfare is only a tool to be used by enemies of the United States and thus implies that the United States should only consider a defensive policy. The nexus branch, by framing lawfare very broadly, fundamentally suggests a stability and civil support operations view of lawfare, but it also "…challenge[s] the common perception that lawfare is a strategy of America's enemies."[16] The neutral branch does not limit policy options by ascribing either negative or positive connotations to the subject, but neither does it suggest a road for policy makers. Considering these three approaches within the broad framework of the Army's operational concept, highlights what may be missing from the United States' policy conversation to arrive at a comprehensive and holistic approach to address this issue.

Framing Lawfare Within Full Spectrum Operations

The Army's operational concept, articulated in Army Field Manual 3-0, Operations,[17] was developed during and with insights gained from the obvious failures of both the civilian and military leadership in conducting operations during the current conflict.[18] Army "full spectrum operations" are now described as follows: "Army forces combine offensive, defensive, and stability or civil support operations simultaneously…

to seize, retain, and exploit the initiative, accepting prudent risk to create opportunities to achieve decisive results."[19] A critical change in arriving at this doctrine was the recognition of the requirement for the Army to be prepared to conduct three fundamentally different activities, requiring fundamentally different skills, simultaneously. For the Army, achieving balance within the full spectrum construct, in order to meet the nation"s expectations for current and future conflicts, meant developing and maintaining stability and civil support skills to a level equivalent to offensive and defensive skills. Lawfare is a reality of the current conflict and the Army"s operational construct provides a framework for balancing discussions which have thus far viewed lawfare from only "defensive" and "stability and civil support" operations perspectives. Overlaying the Army"s full spectrum operational concept on the lawfare discussion suggests that policy makers have either discounted, or have failed to consider, "offensive" lawfare operations as a means to achieve the desired ends in the current conflict. Adding offensive lawfare to policy discussions may eventually provide sufficient balance for simultaneous offensive, defensive, and stability and civil support lawfare operations to seize, retain and exploit the initiative in this arena.

Framing Lawfare Within COIN Doctrine

Beginning with the view that the current conflict is best described as a global counterinsurgency (COIN) fight, one can use COIN doctrine to provide a framework within which to conceptualize the utility of, and perhaps the initial objective of, offensive lawfare in the current conflict. Although the Secretary of Defense has not labeled the current conflict a global COIN fight, in 2009, he hinted that this categorization is not unreasonable, stating: "What is dubbed the war on terror is, in grim reality, a prolonged, worldwide irregular campaign."[20] Specifically using the global COIN fight analogy to

describe the current conflict is; however, advocated by writer and consultant, David Kilcullen. His is perhaps a broader perspective, having served in the Defense Department as a COIN strategy adviser to General Petraeus in Multi-National Forces - Iraq (MNF-I) and later as the Chief Strategist in the State Department‟s Office of the Coordinator for Counterterrorism.[21]

COIN theory has long identified sanctuaries as enablers of insurgent activities,[22] and current COIN doctrine points out that eliminating all sanctuaries is a key ingredient for effective COIN operations.[23] Historically, COIN theorists and strategists have spoken in terms of physical sanctuaries such as those demarked by restrictive terrain or by international boundaries. The Army‟s COIN manual recognizes that the meaning of the term sanctuary has been expanded over time to include “„virtual‟ sanctuaries [such as] the Internet, global financial systems, and the international media.”[24] At least one writer has postulated that insurgents now seek to take advantage of sanctuaries in the following realms: “physical, social, virtual, and legal.”[25] This writer does not use the term lawfare; however, he describes “operating under the protection of the laws and freedoms of the western democracies they seek to destroy”[26] as one use of legal sanctuary. He also echoes Army COIN doctrine by suggesting that an effective COIN strategy should pursue the elimination of all forms of sanctuary regardless of their manifestation. Although an offensive lawfare policy may provide some direct impact on our enemies, within the framework of a global COIN fight, it seems logical that the initial policy objective of offensive lawfare should be to eliminate this arena as a sanctuary. An additional benefit of using the global COIN construct is that it appreciates the prolonged nature of COIN fights generally, and thus sets the stage for making policy

decisions that are designed for long-term yields with strategic patience in mind. How courts are currently portrayed in the National Security Strategy is instructive in framing the environment for such a policy discussion.

Current National Security Strategy

Criminal prosecution of terrorists in domestic courts is specifically included in the National Security Strategy which states: "When we are able, we will prosecute terrorists in Federal courts or in reformed military commissions that are fair, legitimate, and effective."[27] The Department of Justice has published a list of just over four hundred terrorism related convictions obtained between September 11, 2001 and March 18, 2010; however, it does not indicate how many of those cases are related to the current conflict nor does there appear to be an effort to do so.[28] Criminal prosecution of terrorists and those that provide them material support has benefits as well as weaknesses that are not unique to this type of prosecution. It is nonetheless an inherently reactive measure, which naturally yields the initiative to the enemy. This is the only mention in the National Security Strategy of the use of courts in the current conflict. What is absent is any discussion of how the courts might otherwise be leveraged to support national security strategy objectives to "disrupt, dismantle, and defeat Al-Qa"ida and its violent extremist affiliates."[29] Even though it is not discussed in policy documents, domestic courts are being leveraged through legislation that enables victims to seek redress from terrorists and their supporters; the effect of which may in fact be in concert with national security strategy objectives.

Existing Legislation Enabling Private Action in Domestic Courts

Congress and the Executive Branch have not been blind to the potential impact of private litigants in domestic courts in the current conflict even if they have not

conceptualized it as offensive lawfare. In spite of some recognition of the potential impact, there has been a significant conflict between the two branches when it comes to dealing with State sponsors of terrorism. Although State sponsors of terrorism may appear to provide a richer target for legal actions than other terrorism enablers, it is important to distinguish State sponsors in policy discussions about offensive lawfare efforts. This is not ideal; however, it may be necessary given the reality of the conflict between the desire to permit victims to obtain compensation from State sponsors and the desire of the executive branch to engage in negotiations with those same State sponsors. The history of this intra-governmental conflict, which is well cataloged in the 2008 Congressional Research Service‟s report for Congress titled "Suits Against Terrorist States by Victims of Terrorism,"[30] might shock most United States citizens, but a quick snapshot serves to illustrate why the distinction may be necessary.

In 1996, Congress passed the Anti-terrorism and Effective Death Penalty Act,[31] which included an amendment to the Foreign Sovereign Immunities Act (FSIA)[32] to allow United States victims of terrorism to file civil suits in federal and state courts against certain State sponsors of terrorism. Although numerous judgments were subsequently awarded under these provisions, the executive branch frustrated victims‟ efforts to enforce the judgments against the State sponsors‟ property held in the United States.[33] With regard to diplomatic property, the executive branch correctly argued that seizing such property would put it in violation of the Vienna Conventions on Diplomatic Relations and Consular Relations. With regard to commercial assets frozen by the United States, the executive branch argued that using those assets to satisfy the judgments exposed United States‟ assets to similar treatment by other States. In

addition, the executive branch argued that, as a practical matter, frozen assets are useful leverage in resolving disputes and re-establishing diplomatic relations with those States.[34]

In 1998, Congress specifically amended the FSIA to permit assets frozen under the International Emergency Economic Powers Act (IEEPA)[35] or the Trading with the Enemy Act (TWEA)[36] to be used to satisfy judgments in terrorism cases; however, in order to get it signed into law by the President, Congress was obliged to include a presidential "national security" waiver provision, which the President then promptly exercised, effectively nullifying the amendment. Continuing to pursue terror victim compensation in cases existing at the time, Congress then sought to repeal the waiver provision in 1999 and 2000[37] but settled on a modification of the waiver and the passage of a provision of law pertaining to eleven specific cases. This law required the United States Treasury to satisfy the judgments against Iran using United States" funds and then seek reimbursement from Iran at some later date, absurdly making the United States the surety for Iranian sponsored terrorism in the amount of $380 million.[38]

On November 26, 2002, the President reversed, in part, earlier executive branch obstructions by signing the Terrorism Risk Insurance Act (TRIA) into law, which specifically made the frozen assets of terrorist sponsor States available to satisfy judgments against those States. To ensure compliance with international law, the President did appropriately retain national security waiver authority for "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations."[39] This new legislation does help ensure that these assets will not be used to further international terrorism; however, practical problems such as how to

ensure equitable treatment of victims from a limited and shrinking pool of frozen State assets still remain.

Although the bulk of offensive lawfare enabling legislation has been focused on named State sponsors of terrorism, Congress has also provided for civil action against non-State supporters of terrorist organizations. The Anti-Terrorism Act (ATA) of 1990,[40] codified at 18 U.S.C. §2331, et seq., imposes civil liability not just on organizations and individuals who commit acts of international terrorism but also on those organizations and individuals that enable such activities.[41] This has been interpreted to include individuals and non-governmental organizations (NGOs), such as charities that are part of the finance chain supporting terrorists.[42] While domestic state courts provide many common law tort causes of action that may also be used to interrupt terrorist funding streams, the ATA provides for the award of treble damages which increases the impact, presuming assets within United States" jurisdiction can be located. Where the ATA provides United States citizens a cause of action, the Alien Tort Claims Act, opens United States courts to non-U.S. citizens for any tort, regardless of location, "committed in violation of the law of nations or a treaty of the United States."[43] This also has been employed against terrorist supporters and financiers.[44] Notably, with regard to assets belonging to non-State supporters of terrorism, there does not appear to be an inherent conflict between our own branches of government as to the desirability of using identified assets to compensate victims.

These laws enable private parties to seek redress in United States courts. If policy makers conceptualize these actions as part of the global COIN fight, they might also ask what the United States Government is doing to maximize their effect on enemy

forces. It seems logical, from a policy perspective, that the United States should encourage and otherwise enable private parties to participate in such actions and should assist in identifying, locating and executing against assets of those against whom judgments are entered;[45] however, there is little evidence of this being done. One provision within the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) currently addresses part of this concern. It states that the "Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state."[46] By using the permissive term "should," this provision does not mandate support; however, it may serve as a template to add similar provisions in other anti-terrorism legislation and to guide United States" policy in countering "negative" lawfare actions in the current conflict.

"Negative" Lawfare Actions and Consequences in the Current Conflict

As previously noted, one particular feature of the current conflict is that the United States and its citizens have been the target of numerous legal actions in European and domestic courts that appear to be aimed at negatively impacting the United States" ability to fight Islamic extremists.[47] This feature of the current conflict supports the "negative" branch of the lawfare discussion. These types of court actions tend to place the United States in a defensive posture and have several potentially negative results.[48]

The most apparent negative tactical effect is the additional cost to the government and its employees both in time and resources. However, a more pernicious short to mid-term effect may result from the intimidation felt by individuals, who would

normally take action or voice opinions contrary to Islamic extremist interests. The very real threat of personal monetary loss resulting from suits filed against individuals in both the government and private sector is probably intended to, and likely causes hesitation, or inaction by these individuals. The fact that Congress has taken action to counter some of the negative repercussions of abusive liable filings in European courts indicates an awareness of this tactic and its consequences. The SPEECH Act, which was signed into law in August 2010, should reduce the level of intimidation present in liable suits filed in European courts by prohibiting enforcement of judgments in the United States in such cases unless they meet United States" due process and free speech standards.[49] This law applies equally to cases associated with Islamic extremism and those that have no bearing on the current conflict; however, the United States government otherwise has no policy to counter the potential personal intimidation impact of such filings.

Pursuing a more aggressive national policy to counter personal intimidation associated with foreign and/or domestic court actions may be an appropriate means of blunting this enemy tool and should help deny them the sanctuary from which they feel empowered to launch such attacks. Though it will likely entail additional costs, this should be balanced against United States" long term interests. Some of the additional cost to the Government is an inevitable part of seeking to ensure that our enacted values are aligned with our espoused values, as they pertain to our commitment to the rule of law. Shrinking from these principles to avoid additional cost should be non-negotiable even if it appears to be playing into the short term enemy tactic.

A far greater concern to the United States Government should be countering the longer term potential collective or compounded public perception impact that these filings may create. Unanswered or unopposed, these filings may present a much greater threat to national security than just increased costs. The strategy of regularized complaints and allegations primarily supports the Islamist "victimization" narrative.[50] This narrative apparently seeks to capitalize on the psychological phenomenon known as "referential validation of falsehoods," whereby a false notion gains common acceptance through repetition.[51] The likely strategic objective of these types of complaints is to create a negative public perception and thereby diminish public support for, or encourage active public opposition to, government efforts to fight Islamic extremists. It has been noted that filings of this nature support two of three identified "core communications strategies embodied in jihadi websites and media: the *legitimation* of the global jihadi movement within existing social and religious frameworks…, and the use of intimidation to cow opponents as well as those within the Muslim world who may turn against them."(original emphasis).[52]

Responses to Various Types of Negative Lawfare Thus Far

With regard to cases that are obviously or arguably related to the current conflict, the United States Government practice has been to observe both civil and criminal actions against United States persons in European courts essentially without interfering. As noted earlier, Congress and the President responded to the apparently abusive libel suits in European courts by passing a law to diminish the impact of such cases under certain circumstances.[53] Such laws diminish the potential financial intimidation impact of judgments in these civil cases; however, it is an after-the-fact remedy that only protects property within United States" jurisdiction and does not relieve defendants from the

burden of attorney and other costs associated with defending such cases. Similar action has not been taken with regard to other civil cases, which leaves United States persons exposed not only to the costs of defending against abusive litigation practices but also to the costs of potential adverse judgments. Although it leaves United States citizens at least temporarily exposed and carries with it disadvantages associated with passing any legislative measure, legislative relief that responds to identified abusive practices has the advantage of not directly criticizing or challenging friendly States or their courts. For this reason it may be the most prudent means, from the international relations perspective, of protecting United States persons from such predatory practices. Whether it remains domestically acceptable to leave the defense cost burden with individual defendants may depend upon public perception of the connection of such cases to the current conflict.

With regard to criminal complaints filed against United States Government employees for conduct within the scope of their duties, such as the rendition cases filed in Italy,[54] there may be no real pre-trial alternative to engaging with political co-equals. Although the Italians appear to have ignored their obligations under the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA) to acknowledge the primary jurisdiction of the United States with regard to the one accused active duty service member, they did dismiss similar cases against three defendants for whom the United States asserted diplomatic immunity.[55] The cost of not directly engaging in such suits, as evidenced by the verdict in the Italian rendition trial, is that no counter-narrative is made public and no contrary position is offered in court, thus making adverse findings more likely especially in politically charged circumstances.[56] In that particular case an

adverse judgment was entered, including a fine of over two million dollars. Because one of the defendants in the case owned real estate in Italy, it was seized to satisfy the judgment.[57] A foreseeable result of choosing not to interact with the court is that United States government employees are exposed to greater likelihood of personal liability. Individuals also face freedom of travel restrictions for the remainder of their lives to avoid incarceration in foreign jails as well as the possible inability to own property or maintain bank accounts outside the United States for fear they will be seized to satisfy an adverse judgment.

Policy Options and Recommendations for a More Offensive Lawfare Posture

The fact the United States Government has prosecuted many criminal cases that the Department of Justice has classified as being terrorism related[58] and has provided for civil causes of action for victims of terrorism indicates an awareness of the utility of our own courts in countering terrorism, even if only criminal prosecution is tied overtly to national security strategy. On the other hand, the mere existence of civil causes of action, combined with the fact that the United States Government has done little more than observe proceedings in European courts 2001, is arguably a sign that, unlike the legal scholars that have written on the lawfare phenomenon, United States policy makers in general either under-appreciate that courts indeed have become part of the battlespace of the current conflict or do not recognize the potential value of viewing courts in this light. Other than criminal actions in domestic courts this existing, seemingly passive approach relinquishes not only an opportunity for the United States to actively shape the arguments within this battlespace, but also relinquishes an opportunity to eliminate a sanctuary and to establish a counter-narrative to that of the Islamic extremists.

Based on the above analysis, this paper advocates an offensive lawfare policy to support national security strategy objectives by leveraging foreign and domestic court actions to better "disrupt, dismantle, and defeat Al-Qa"ida and its violent extremist affiliates."[59] Consequently, a policy discussion aimed at denying funding to these organizations while simultaneously shaping arguments and establishing a counter-narrative within the lawfare battlespace should consider not only the various forums in which the policy might be applied, but also options to increase the impact of existing causes of action within those forums. To implement this policy change, four broad recommendations to improve our offensive lawfare posture by providing support to plaintiffs in domestic court actions, to defendants in European criminal actions, and to certain defendants and plaintiffs in European civil actions will now be discussed.

Support in Domestic Court Actions

Improving the impact of anti-terrorism causes of action that currently exist in United States" courts may be the simplest means of leveraging courts to envision and to implement. In providing civil causes of action, Congress has essentially enabled private citizens to carry on the global COIN fight on behalf of the United States.[60] Recognizing that these cases have the effect of furthering our national security objectives, it seems prudent to encourage their use and maximize their impact by providing certain forms of support to plaintiffs. The form of support that may have the most immediate impact could be realized by incorporating, into all anti-terrorism causes of action, language similar to that found in the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) regarding assisting successful plaintiffs in executing judgments.[61] It would also be advisable to make those provisions more aggressive by changing the permissive language, "should" to "shall" in order to mandate such support.

Additional support for plaintiffs could include informational and logistical support and might possibly include some forms of financial support. All of these should be considered. Precedence for providing similar low level support to private citizens victimized in criminal actions is found in the federal victim-witness assistance program.[62] Leveraging the existing infrastructure of the victim-witness program within the Department of Justice would improve the feasibility and acceptability of this option by making it less costly to establish and administer. Regardless of the breadth of support contemplated for civil actions, any such policy would require supporting legislation to enable the expenditure of funds for those purposes.

Support in Foreign Courts - Generally

A policy of active engagement in European courts, whereby the United States intentionally becomes a party to actions, may result in a public opinion backlash because the United States would likely be portrayed as being heavy handed. A more politically attuned alternative to active engagement would be to provide support that is less readily apparent to the foreign public. This is not to suggest support that would qualify as "*covert action*," which the United States Code defines as "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly."[63] Not advertizing the United States Government‟s role may be beneficial under some circumstances; however, undertaking activities in this arena in which the United State‟s role is affirmatively masked and denied carries substantial actual and potential costs that are not likely worth the expected gain. Conversely, passive or indirect support to defendants subjected to certain categories of lawsuits as well as support to groups or individuals who may have

cognizable claims in foreign courts against organizations or individuals connected to terrorist activities could economically and effectively deny foreign courts as an enemy sanctuary.

Support in European Criminal Actions

With regard to criminal complaints filed against United States Government employees, such as the rendition cases filed in Italy,[64] assisting the defendants directly or indirectly may be possible once it is determined that the conduct was within the scope of their duties. Providing legal counsel may be one means of providing such support; however, it may have the unintended consequence of increasing negative attention in an already politically charged environment. Reimbursement after the fact may not be as proactive as providing legal counsel, but it probably serves to reduce the official profile of such cases. A means for such reimbursement may currently exist for service members under the Military Claims Act,[65] Federal Tort Claims Act[66] or Personnel Claims Act.[67] Although a loss resulting from legal action is not specifically discussed within these statutes, they contain discretionary language that could permit the payment of a "within the scope of duty" claim. The objective of this type of support policy would be to free government employees to make decisions without considering the financial intimidation impact of having to defend such cases or having to face any adverse financial judgments arising therefrom. Hence, enacting similar legislation for civilian employees not covered under these statutes as a matter of equity should be relatively non-contentious.

This type of support will not likely involve many cases; however, the impact of the support could prove significant. Additionally, providing this type of support should require little additional infrastructure and should be seen domestically as politically

neutral thereby making it broadly supportable. From the international relations perspective, providing such low level support should not be viewed as obstructionist, because it does not interfere with the judicial process. One potential negative consequence of providing this type of support may be the unintended consequence of encouraging large judgments; however, with appropriate legislation the only property subject to seizure to satisfy a judgment would be that which is located outside the United States, thereby minimizing the public‟s financial exposure in these few cases. The number of cases in which United States persons are subjected to civil action in European courts by those who seek to support Islamic extremist ends is likely to be greater. These defendants too should be afforded a certain level of support to blunt the effect of Islamic extremists and their supporters.

Support to Defendants in European Civil Actions

As noted previously, one of the likely intended short to mid-term effects of having to defend against civil actions brought by Islamic extremist supporters in foreign courts is financial intimidation; hence, the United States should seriously consider adopting policies to counter this threat. The baseline for this policy should be the existing SPEECH Act. Using the SPEECH Act as a model, the United States could enact broader legislation to prevent payment of judgments in any case deemed to be in furtherance of Islamic extremist ends if the case fails to meet specified, United States equivalent, standards.

Policy makers should also consider more substantial support for defendants in these types of cases to further reduce their negative impact. Support for defendants could begin with relatively low-cost informational and logistical support such as that provided to individuals through the federal victim-witness assistance program[68] as is

suggested for domestic civil cases. A more aggressive policy would ideally include reimbursement for expenses when it is determined that the case in question is reasonably linked to the current conflict. If support were to include reimbursement for adverse judgments that are actually collected, the United States assumes a greater financial risk; however, removing personal financial intimidation as an enemy weapon gains an incalculable benefit. Determining what types of cases should qualify for this or similar financial support will be difficult; however, an example might be to provide reimbursement of expenses in libel cases brought against a United States person for printing an article revealing a plaintiff‟s financial connections to known terrorist organizations. None of the support suggested for defendants would prevent adversaries from bringing such suits, but the suggestions offer a more proactive approach and implementation may remove the incentive for bringing suits for the purpose of financial intimidation. Perhaps the type of support that deserves the most exploration in seeking not only to deny the enemy sanctuary, but also to gain momentum in shaping arguments and establishing a counter narrative is that of support to plaintiffs in European civil courts.

Support to Plaintiffs in European Civil Actions

European civil courts are perhaps overlooked as an offensive lawfare venue because of a pre-disposition to use United States‟ courts and an expectation that they will provide an adequate means for victims seeking redress.[69] Although the pre-disposition and the expectation are reasonable, the potential utility of plaintiff action in European civil courts should not be ignored. One problem is that international agreements currently do not require the establishment of civil remedies against terrorists or their supporters. Although the International Convention for the Suppression

of the Financing of Terrorism requires State parties to create domestic mechanisms to impose liability upon those involved in terror financing, the form of the liability is optionally stated as: “criminal, civil *or* administrative.” (emphasis added).[70] To address this shortcoming in international law and to ensure civil liability mechanisms, some have suggested bi-lateral agreements or perhaps a United Nations convention on civil suits against terrorists.[71] This would certainly ensure greater depth in this battlespace in the long term. In the near term; however, a United States‟ policy aimed at leveraging this venue to gain momentum in shaping arguments and establishing a counter narrative could begin as simply providing information to terror victims about existing causes of action within European civil courts which may apply to their circumstances. As suggested for support within other venues, the existing victim-witness liaison program[72] would be an ideal mechanism within which to communicate this information efficiently and cost-effectively. Victim-witness liaison personnel could be specifically tasked to identify and provide information to victims and their family members about resources and venues available to them for to seek redress through European courts. In order to maximize the impact and to reach as wide an audience as possible, such a program should also include an information campaign to inform the public of the same or similar information.

A more aggressive policy could include encouraging, assisting and possibly enabling private parties who have been victimized, directly or indirectly, by terrorist activities to take civil legal action in foreign courts against individuals and organizations that either participate in or provide support to Al-Qa‟ida and its violent extremist affiliates. This policy would serve not only to deprive these groups and their supporters

of existing financial resources by making them more susceptible to adverse judgments but may also serve to build a record for and encourage a public counter-narrative to disrupt and eventually defeat them.

Relations with human rights groups should also be taken into consideration in policy formulation. Including human rights groups" information as potential resources to private parties victimized by Islamic extremists would not only encourage the support of human rights groups, but it also would give the Department of Justice and the State Department an opportunity to engage various human rights groups to assist in taking up the cause of terror victims in both domestic and foreign courts. Building such a bridge to human rights groups may eventually lead to reduced criticism from these groups; however, that should not be seen as a primary aim of this policy. Identifying human rights groups as resources for victims will allow the human rights groups to take credit for any compensation awarded or paid to the victims, but more importantly it will encourage the human rights groups to broadcast the terrorists" misconduct thereby adding to the counter-narrative.

Policy discussions should also consider the resources that will be required to monitor the evolution of cases as well as foreign legislation to provide additional information, as needed, and to make proactive adjustments and react to trends. In addition, funding will be required for informational campaigns regardless of whether federal victim-witness resources are leveraged but costs may be extrapolated, in part, from costs associated with current victim-witness program expenditures. If federal victim-witness advocates are tasked to support this policy, changes to current legislation (18 USC §3771) or additional legislation may be required to ensure funding for the

additional responsibilities.[73] Regardless of the breadth of support contemplated for civil actions, any such policy would require supporting legislation to enable the expenditure of funds for those purposes.

Conclusion

Overlaying the discussion of "lawfare" with the Army's operational concept and counter-insurgency doctrine provides a framework within which to conceptualize a gap in our thinking about the use of courts in the current conflict. While available to the United States in theory, it does not appear that the United States has had any policy for leveraging either foreign or domestic courts in its current fight against Islamic extremists other than in specific criminal cases and the ancillary effect of some limited domestic civil litigation. The policy options discussed for providing support to litigants in certain domestic and foreign court actions are aimed at denying our adversaries a form of sanctuary, blunting their abuse of these courts and leveraging both foreign and domestic courts to better support our national security strategy with regard to the current conflict. Accepting a more holistic view of lawfare to include "offensive lawfare" should enable policy makers to conceptualize lawfare as having much greater potential as a weapon in the global COIN fight than is currently understood and should be the starting point for policy discussions.

Endnotes

[1] John Bacon, "Groups Sue To Stop Targeted Killings," USA Today, August 31, 2010, http://www.usatoday.com/printedition/news/20100831/nline31_st.art.htm (accessed March 2, 2011).

> "President Obama, the Defense Department and the CIA are among defendants in the lawsuit filed by the American Civil Liberties Union and the Center for Constitutional Rights. The lawsuit was filed on behalf of Nasser al-Awlaki, father of a U.S.-born Islamic cleric in Yemen, Anwar al-Awlaki, who is accused of

having ties to al-Qaeda and providing inspiration for the shootings at Fort Hood in Texas and a failed Times Square car bombing plot." Ibid.

[2] See e.g. Islamic Society of Boston v. Boston Herald, Inc., 21 Mass.L.Rptr. 441, July 21, 2006.

[3] See e.g. United States Embassy, London cable, "Subject: Speaking out on GITMO and Detainees: Better to Explain the Future than Justify the Past," August 12, 2005, http://www.state.gov/documents/organization/131847.pdf (accessed March 2, 2011). This cable contains a description of State Department responses to spurious abuse allegations in the media.

[4] "Italy indicts 31 in alleged CIA kidnapping: 26 Americans, 5 Italians to be tried over Milan abduction of terror suspect," Associated Press, February 16, 2007, http://www.msnbc.msn.com/id/17184663/ (accessed March 2, 2011).

[5] Charles Dunlap, "Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts," (Washington, DC: Kennedy School of Government, Harvard University, November 29, 2001), 4.

[6] Charles J. Dunlap, Jr., "Lawfare Today," *Yale Journal of International Affairs* (Winter 2008), 146.

[7] Dunlap, "Law and Military Interventions," 4. "There are many dimensions to lawfare, but the one ever more frequently embraced by U.S. opponents is a cynical manipulation of the rule of law and the humanitarian values it represents." Ibid.

[8] Ibid.

[9] The Lawfare Project. http://www.thelawfareproject.org/ (accessed March 2, 2011).

> *"Lawfare* denotes "the use of the law as a weapon of war" [citing Dunlap, see note 8] or, more specifically, the abuse of the law and judicial systems to achieve strategic military or political ends.
>
> It consists of the *negative* manipulation of international and national human rights laws to accomplish purposes other than, or contrary to, those for which they were originally enacted." Ibid. (original emphasis)

[10] Al Qaeda Training Manual, excerpts in translation, released by the United States Department of Justice, December 6, 2001, http://www.fas.org/irp/world/para/aqmanual.pdf (accessed March 2, 2011), 137.

[11] See e.g. Patricia Janet, "Lawfare - Time for Rules of Engagement?" lecture to Hebrew University of Jerusalem Faculty of Law, Israel, January 5, 2010, http://www.attorneygeneral.gov.uk/NewsCentre/Speeches/Pages/%E2%80%9CLawfare%E2%80%93TimeforRulesofEngagement%E2%80%9D.aspx (accessed March 2, 2011) (Patricia Janet, Baroness Scotland of Asthal, served as Attorney General for the United Kingdom from 28 June 2007 – 11 May 2010.)

[12] Erika Myers, "Conquering Peace: Military Commissions as a Lawfare Strategy in the Mexican War," *American Journal of Criminal Law*, Vol. 35, No. 2, pp. 201-240, 2008 http://www.pegc.us/archive/Journals/Myers_35_Am_J_Crim_L_202.pdf (accessed March 2, 2011). General Winfield Scott established several forms of military tribunals during the Mexican War (1846-1848). United States personnel were tried by military commissions for non-military offenses committed against the Mexican population (such as murder and robbery). "Councils of war," which applied courts-martial procedures, were used to try Mexican citizens accused of trying to "recruit" United States personnel to desert (usually for higher pay or the promise of land). And "councils of war applying summary procedures were used to try (and usually execute) guerrilla forces for offenses "under the known laws of war." Ibid.

[13] Scott Horton, "State of Exception: Bush's war on the rule of law," *Harper's Magazine*, July 2007. http://www.harpers.org/archive/2007/07/0081595 (accessed March 2, 2011).

[14] BG Mark Martins, "Reflections on „Lawfare" and Related Terms," November 18, 2010 http://www.lawfareblog.com/2010/11/reflections-on-%E2%80%9Clawfare%E2%80%9D-and-related-terms/ (accessed March 2, 2011). See also: Mark Martins, "Lawfare: So Are We Waging It?," November 19, 2010 http://www.lawfareblog.com/2010/11/lawfare-so-are-we-waging-it/ (accessed March 2, 2011) and Tom Nachbar, "Law as a Means to Counterinsurgency: Practical Considerations," January 9, 2011 http://www.lawfareblog.com/2011/01/tom-nachbar-on-law-as-a-means-to-counterinsurgency-practical-considerations/#more-1124 (accessed March 2, 2011).

[15] Although good governance and adherence to the rule of law may create and maintain conditions that are inhospitable to insurgents and terrorists, providing for or developing a functioning legal system in an occupied or war torn territory has a much broader purpose and is fundamentally different from using an existing legal system to derive an advantage over a military adversary.

[16] Myers, "Conquering Peace," 201.

[17] U.S. Department of the Army, *Operations*, Army Field Manual 3-0, (Washington, DC: U.S. Department of the Army, 27 February 2008).

[18] Donald P. Wright and Timothy R. Reese, *On Point II: Transition to the New Campaign* (Fort Leavenworth, Combat Studies Institute Press, 2008), 177-178,

[19] U.S. Department of the Army, *Operations*, 3-1.

[20] Robert M. Gates, "A Balanced Strategy: Reprogramming the Pentagon for a New Age," *Foreign Affairs*, January/February 2009. http://www.jmhinternational.com/news/news/selectednews/files/2009/01/20090201_20090101_ForeignAffairs_ABalancedStrategy.pdf (accessed March 2, 2011); IAW U.S. Department of Defense, *Irregular Warfare (IW)*, Department of Defense Directive 3000.07, (Washington, DC: U.S. Department of the Army, December 1, 2008) 2, "Irregular warfare" is a much broader doctrinal term but it does include COIN.

[21] David Kilcullen, "Countering Global Insurgency," *Journal of Strategic Studies*, 28; no. 4, (November 30, 2004): 597-618.

[22] David Galula, *Counterinsurgency Warfare: Theory and Practice*, (New York: Praeger Publishers, 1964), 35.

[23] U.S. Department of the Army, *Counterinsurgency*, Army Field Manual 3-24, (Washington, DC: U.S. Department of the Army, 27 February 2008) 1-16.

[24] Ibid.

[25] David Wise, *The Role of Sanctuary in an Insurgency*, A Monograph (Fort Leavenworth, KS: United States Army Command and General Staff College, School of Advanced Military Studies, 2008).

[26] Ibid., 3.

[27] Barack H. Obama, *National Security Strategy 2010*, (Washington, D.C.: The White House, May 2010), 36. http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (accessed March 2, 2011).

[28] United States Department of Justice, *National Security Division Statistics on Unsealed International Terrorism and Terrorism-Related Convictions 9/11/01 - 3/18/10* http://www.justice.gov/cjs/docs/terrorism-convictions-statistics.pdf (accessed March 2, 2011).

[29] Obama, *National Security Strategy 2010*, 19.

[30] Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism* (Washington, D.C: Library of Congress Congressional Research Service, Updated August 8, 2008), http://www.fas.org/sgp/crs/terror/RL31258.pdf (accessed March 2, 2011). See also Strauss, D. M., "Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common-Law Suits." *Vanderbilt Journal of Transnational Law* 38, no. 3 (May 2005), 679-742. For discussion of terror financing and United States‟ efforts to reduce financial support to terrorists see generally, Jimmy Gurulé, *Unfunding Terror* (Northhampton, MA: Edward Elgar Publishing, Inc., 2008).

[31] *Antiterrorism and Effective Death Penalty Act of 1996*, Public Law 104–132, 104th Congress, April 24, 1996 http://www.gpo.gov/fdsys/pkg/PLAW-104publ132/pdf/PLAW-104publ132.pdf (accessed March 2, 2011)

[32] 28 U.S.C. §§1602, *et seq*.

[33] Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism,* 7-18.

[34] Ibid.

[35] *International Emergency Economic Powers Act (IEEPA),* 50 U.S.C. §§1701-1707.

[36] *Trading with the Enemy Act (TWEA),* 12 U.S.C. §95a.

[37] See *Hearing before the Senate Judiciary Committee on Terrorism: Victims' Access to Terrorists' Assets*, 106th Congress, 1st Sess. (October 27, 1999) and *Hearing Before the*

Subcommittee on Immigration and Claims of the House Judiciary Committee on H.R. 3485, the "Justice for Victims of Terrorists Act," 106th Congress, 2d Sess. (April 13, 2000).

[38] *Victims of Trafficking and Violence Protection Act of 2000*, Public Law 106–386, §2002, "Payment of Certain Anti-Terrorism Judgments," (106th Cong., October. 28, 2000), http://www.gpo.gov/fdsys/pkg/PLAW-106publ386/pdf/PLAW-106publ386.pdf (accessed March 2, 2011). Codified at 22 U.S.C. §7101 et seq.

[39] Public Law 107-297 (November 26, 2002), 116 Stat. 2322; see also 28 U.S.C. §1605A. "Terrorism exception to the jurisdictional immunity of a foreign state."

[40] The Antiterrorism Act (ATA) of 1990 which amended 18 U.S.C. §2333 and provided the civil remedy became law pursuant to Public Law 101-519, § 132 (Nov. 5, 1990) as part of the Military Construction Appropriations Act; however, it was repealed pursuant to Public Law 102-27, Title IV, § 402 (Apr. 10, 1991) because of an administrative enrolling error. 18 U.S.C. §2333 later became law on October 29, 1992 as part of Public Law 102-572, the Federal Courts Administration Act of 1992.

[41] 18 U.S.C. §2333a provides for a civil remedy for acts of terrorism:

> "Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney"s fees." Ibid.

[42] See Boim v. Holy Land Foundation for Relief and Development, 549 F.3d 685 (7th Cir. 2008) (en banc).

[43] 28 U.S.C. §1350 (referred to both as the "Alien Tort Statute of 1789" (ATS) and the "Alien Tort Claims Act" (ATCA)).

[44] See e.g. *Almog v. Arab Bank,* filed on December 21, 2004 in the Eastern District of New York (case number CV 04-5564), according to plaintiffs" counsel, "on behalf of almost 6,000 individuals victimized by Palestinian terrorist organizations in Israel" with a specific aim of reducing terror financing. http://www.motleyrice.com/files/9-11-to-bankrupt-documents/almog-et-al-v-arab-bank-complaint-12-21-04.pdf (accessed March 2, 2011).

[45] The practical matter of enforcing judgments is ever present regardless of whether a case is terrorism related. In cases where assets can be located within the United States enforcing a judgment is a relatively easy matter when compared with enforcing a judgment outside the United States. Presuming property can be located outside the United States, international law permits foreign courts to enforce United States" courts judgments on the basis of legal reciprocity (also referred to as comity); however, they are not required to do so. Similar to Congress" determination in the SPEECH Act, that foreign judgments cannot be enforced in the United States, if the foreign court has not met basic protections found in the United States, foreign courts may determine that the US courts have overreached in exercising jurisdiction or have granted an excessive judgment and simply refuse to enforce the judgment.

[46] 28 U.S.C. §1610(f)(2)(A).

[47] See e.g. Unus v. Kane, 2005 WL 6295210 (E.D.Va. Jul 25, 2005)(4th Cir. 2009); Unus v. Kane 565 F.3d. 103 (4th Cir. (Va) May 6, 2009, wherein nine government employees and one private citizen were sued in their individual capacities for a warrant based search conducted against the home of Iqbal Unus who was employed by the Islamic Institute of Islamic Thought as part of a larger investigation of organizations suspected of providing material support to terrorist. The plaintiffs lost on the merits and were ordered to pay the costs and attorney"s fees of the non-government affiliated defendant because the suit was deemed "frivolous, unreasonable, or groundless"; however, this decision was reversed on appeal forcing the "victorious" defendant to pay over $40,000 to defend against the allegations.

[48] Daniel Pipes, "Waging Jihad Through the American Courts," *The American Spectator* March 2010, http://www.danielpipes.org/8131/jihad-through-american-courts (accessed March 2, 2011).

[49] *Securing the Protection of our Enduring and Established Constitutional Heritage Act* (The SPEECH Act), Public Law 111-223, 111th Cong., August 10, 2010. (to be codified at 28 U.S.C. §§ 4101-05).

[50] See e.g. Majid Nawaz, "Jihadists and „The Narrative,"" interview by Lesley Stahl, *60 minutes*, April 25, 2010. http://www.cbsnews.com/stories/2010/04/23/60minutes/main6425491.shtml (accessed March 2, 2011).

[51] Alan S. Brown and Lori A. Nix, "Turning lies into truths: Referential validation of falsehoods," *Journal of Experimental Psychology: Learning, Memory, and Cognition*, Vol 22(5), Sep 1996, 1088-1100.

[52] Steven R. Corman et al., eds., *Weapons of Mass Persuasion: Strategic Communication to Combat Violent Extremism,* (New York: Peter Lang Publishing, 2008), 32.

[53] *Securing the Protection of our Enduring and Established Constitutional Heritage Act* (The SPEECH Act), Public Law 111-223, 111th Cong., August 10, 2010. (to be codified at 28 U.S.C. §§4101-05).

[54] "Italy indicts 31 in alleged CIA kidnapping: 26 Americans, 5 Italians to be tried over Milan abduction of terror suspect," *Associated Press*, Feb. 16, 2007. http://www.msnbc.msn.com/id/17184663/ (accessed March 2, 2011).

[55] Ibid.

[56] Manuela D'Alessandro and Daniel Flynn, "Italy convicts former CIA agents in rendition trial," *Reuters*, Nov. 4, 2009, http://www.reuters.com/article/idUSTRE5A33QB20091104 (accessed March 2, 2011).

By avoiding direct involvement, the United States does not lend credibility to the court system in question and avoids greater media interest, thereby depriving the enemy of a potential propaganda tool. Not cooperating with such courts does make the United States government vulnerable to claims of obstructionism; however, if the court is unable to properly serve the defendant with notice, the court must choose between going forward with the case in violation of the "Convention for the Protection of Human Rights and Fundamental Freedoms" as the Italian court chose, and delaying the case until the defendant is properly served, which may

never occur. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFiguresENAvril2010.pdf (accessed March 2, 2011).

[57] Michael Isikoff, "To Pay Abu Omar, CIA's Man in Milan Loses Villa," *Newsweek,* November 7, 2009, http://www.newsweek.com/blogs/declassified/2009/11/07/to-pay-abu-omar-cia-s-man-in-milan-loses-villa.html (accessed March 2, 2011).

[58] United States Department of Justice, *National Security Division Statistics on Unsealed International Terrorism and Terrorism-Related Convictions 9/11/01 - 3/18/10* http://www.justice.gov/cjs/docs/terrorism-convictions-statistics.pdf (accessed March 2, 2011).

[59] Obama, *National Security Strategy 2010*, 19.

[60] See Jennifer Rosenfeld, "The Antiterrorism Act of 1990: Bringing International Terrorists to Justice the American Way," *Suffolk Transnational Law Journal* (Spring 1992): 728. See also *Debra M. Strauss,* "Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common-Law Suits," *Vanderbilt Journal of Transnational Law* 38 (May 2005): 682.

[61] 28 U.S.C. §1610(f)(2)(A). "…the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state." Ibid.

[62] 18 U.S.C. §3771. "Crime Victims" Rights," Describes specific rights of crime victims and tasks the Department of Justice and other departments and agencies of the United States engaged in criminal prosecutions to uphold such rights.

[64] "Italy indicts 31 in alleged CIA kidnapping," *Associated Press*, Feb. 16, 2007.

[65] *Military Claims Act (MCA),* 10 U.S.C. §2733.

[66] *Federal Tort Claims Act (FTCA),* 28 U.S.C. §§1346(b), 2671-2680.

[67] *The Military Personnel and Civilian Employees' Claims Act of 1964,* (1982), 31 U.S.C. §3721, (commonly referred to as the Personnel Claims Act [PCA]).

[68] 18 U.S.C. §3771.

[69] Congressional Research Service, *Suits Against Terrorist States, 23.* The CRS report on Terror Victim Compensation notes that the tension in arriving at a policy to address victim compensation is that while litigation gives victims their day in court and provides a means to hold terrorist enablers accountable, it is an unpredictable system that may result in inequitable results, may be costly to administer and may put the United States in an awkward diplomatic position. On the other hand, providing insurance type compensation might be more predictable and provide for more equitable payments but it may also be very costly, may not provide the level of compensation available from litigation, does not provide victims their day in court, and has no impact on terrorist enablers. Ibid.

[70] UN General Assembly, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, http://treaties.un.org/doc/db/Terrorism/english-18-11.pdf (accessed March 2, 2011). Article 5 provides in pertinent part:

> *"*Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative." Ibid.

[71] John N. Moore, ed., *Civil Litigation Against Terrorism*, (Durham, Carolina Academic Press, 2004), 102-105,

[72] 18 U.S.C. §3771**.**

[73] 18 U.S.C. §3771.